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Kerajaan Malaysia & Ors v Then See Nyuk & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(NCVC)(W)-308–08 OF 2016
TENGKU MAIMUN, ABDUL RAHMAN SEBLI AND ZALEHA YUSOF JJCA
20 SEPTEMBER 2017

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Criminal Procedure — Search warrant — Validity — Allegation of infringement of copyright — Raiding of internet cafe — Items seized for investigation returned — Owners not charged for any offence — Owners filed action for loss and damages — Whether search warrant legally-issued — Whether information on oath stated reasonable cause for suspecting infringement — Whether magistrate correct in issuing search warrant — Whether requirement under s 44(1) of the Copyright Act 1987 satisfied — Whether raiding officer entitled for protection under s 57 of the Copyright Act 1987 — Whether absence of prosecution affects warrant of search and seizure

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One Blizzard Entertainment Inc ('Blizzard'), a Delaware (USA) corporation, was the owner of the copyright works entitled Warcraft 3 Battlechest, Diablo 2 Battlechest and Starcraft Battlechest ('Warcraft copyright'). Blizzard had licensed Sendi Mutiara Multimedia Sdn Bhd, a Malaysian corporation ('SMM'), inter alia, the right to retail, sell, distribute and collect monthly royalty from cyber cafes for the software products of the Warcraft copyright. On 17 November 2009, upon receiving a complaint from SMM of infringement of its Warcraft copyright, a team of enforcement officers of the Ministry of Domestic Trade and Consumer Affairs ('the second appellant'), which included an enforcement assistant ('the third appellant'), and also representatives of SMM, had gone and raided an internet cafe, Gen X, owned by the respondents. Some items were seized, purportedly for investigations into possible offence under the Copyright Act 1987 ('the Copyright Act'). However, after a total period of one year and eight months, the seized items were returned to the respondents without them or Gen X being charged for any offence. Consequently, the respondents filed an action in the High Court for loss and damages purportedly suffered by them as a result of the appellants' illegal raid and seizure. After a full trial, the High Court granted some of the reliefs prayed for by the respondents ie, special as well as exemplary damages, loss of earning and loss of reputation. Hence, this appeal by the appellants. The main issue that arose was whether the search warrant was legally issued.

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Held, allowing the appeal with costs:

(1) The appellants had acted upon receiving the official complaint from SMM vide a letter dated 26 October 2009, exhibiting its enforcement technical surveillance report, statutory declaration, letter of authorisation and power of attorney. The appellants had scrutinised the complaint before taking action. The search warrant and the raid were not done out of the blue. There was reasonable cause for the appellants to act based on the official complaint. It was on the respondents to show if there was none and in this instance, the respondents had failed to do so (see para 16).

(2) The information on oath, which was given to the magistrate on the same day the raid was conducted, clearly stated that there was a reasonable cause for suspecting that there were in Gen X 'salinan langganan, perekaan, artikel, buku, dokumen atau lain-lain keterangan' pertaining to an offence under s 41 of the Copyright Act. Therefore, the magistrate was correct in issuing the search warrant as the requirement of s 44(1) of the Copyright Act had already been satisfied. The search warrant was good in law and valid. It was issued pursuant to the magistrate's criminal jurisdiction. Hence, the relevant High Court which has the jurisdiction to set it aside is the High Court exercising its criminal, appellate or revision power under the Courts of Judicature Act 1964. Therefore, the High Court in this case should not, in determining the civil claim of the respondents for loss or damages suffered by the respondents, go behind the search warrant and question its legality or the manner in which it was obtained (see paras 17 & 19–20).

(3) The third appellant, being the enforcement assistant of the second appellant, was also, by virtue of Government *Gazette* PU(B) 131/2003, the Assistant Controller under the Copyright Act. Hence, he was entitled for protection under s 57 of the Copyright Act, unless it could be shown there was mala fide in his actions. There was no evidence that showed the raid was done not in good faith. The search warrant and the raid were validly issued. The decision of the High Court to award the respondents against the appellants, which included the third appellant, was obviously misconceived (see para 22).

(4) To prosecute or not to prosecute is the prerogative of the public prosecutor, based on the availability of evidence pertaining to the offence. The absence of prosecution did not affect the warrant of search and seizure as whether to charge or not to charge depended on the availability of evidence to prove the ingredients of the offence (see paras 23–24).

[Bahasa Malaysia summary

Blizzard Entertainment Inc ('Blizzard'), satu perbadanan Delaware (USA), adalah pemilik hak cipta Warcraft 2 Battlechest, Diablo 2 Battlechest dan Starcraft Battlechest ('hak cipta Warcraft'). Blizzard telah memberi lesen

kepada Sendi Mutiara Multimedia Sdn Bhd, satu perbadanan di Malaysia ('SMM'), antara lain, hak untuk menjual, mengedar dan mengutip royalti bulanan daripada kafe siber untuk produk perisian hak cipta Warcraft. Pada 17 November 2009, sebaik sahaja menerima aduan daripada SMM berkenaan pelanggaran penggunaan hak cipta Warcraft, satu pasukan pegawai penguatkuasa Kementerian Perdagangan Dalam Negeri Koperasi dan Kepenggunaan ('perayu kedua'), yang termasuk seorang penolong penguatkuasa ('perayu ketiga'), dan juga wakil-wakil SMM, telah menyerbu kafe internet Gen X milik responden-responden. Beberapa item telah disita untuk siasatan atas kemungkinan terdapat satu kesalahan di bawah Akta Hakcipta 1987 ('Akta Hakcipta'). Walau bagaimanapun, selepas tempoh satu tahun lapan bulan, item-item yang disita telah dikembalikan kepada responden-responden tanpa mereka atau Gen X dituduh atas apa-apa kesalahan. Seterusnya, responden-responden memfailkan tindakan di Mahkamah Tinggi untuk kehilangan dan kerugian yang dialaminya akibat serbuan dan penyitaan haram yang dilakukan perayu-perayu. Selepas perbicaraan penuh, Mahkamah Tinggi membenarkan relif-relif yang dituntut oleh responden-responden iaitu ganti rugi khas dan teladan, kehilangan pendapatan dan kehilangan reputasi. Oleh itu, rayuan ini oleh perayu-perayu. Isu utama yang timbul adalah sama ada waran geledah telah dikeluarkan secara sah.

Diputuskan, membenarkan rayuan dengan kos:

(1) Perayu-perayu telah bertindak apabila menerima aduan rasmi daripada SMM melalui surat bertarikh 26 Oktober 2009, dengan melampirkan laporan penguatkuasaan pengawasan teknikal, akuan berkanun, surat kebenaran dan surat kuasa wakil. Perayu-perayu telah meneliti aduan sebelum mengambil tindakan. Waran geledah dan serbuan tidak dilakukan secara tiba-tiba. Terdapat kausa munasabah untuk perayu-perayu bertindak berdasarkan aduan rasmi itu. Adalah tanggungjawab responden untuk menunjukkan bahawa tiada kausa munasabah tetapi dalam keadaan kes ini, responden-responden gagal berbuat demikian (lihat perenggan 16).

(2) Maklumat bersumpah, yang diberi kepada majistret pada hari yang sama serbuan dilakukan, dengan jelasnya menyatakan bahawa terdapat alasan munasabah untuk mengesyaki terdapat dalam Gen X salinan, langganan, perekaan, artikel, buku, dokumen dan lain-lain keterangan berhubung dengan satu kesalahan bawah s 41 Akta Hakcipta. Oleh itu, Majistret betul dalam mengeluarkan waran geledah kerana keperluan s 44(1) Akta Hakcipta telah dipenuhi. Waran geledah adalah betul dari segi undang-undang dan adalah sah. Ini dikeluarkan menurut bidang kuasa jenayah. Oleh itu, Mahkamah Tinggi relevan yang mempunyai bidang kuasa mengetepikan adalah Mahkamah Tinggi yang melaksanakan kuasa jenayah, rayuan dan semakan bawah Akta Mahkamah Kehakiman 1964.

Oleh itu, Mahkamah Tinggi dalam kes ini tidak patut, dalam menentukan tuntutan sivil responden-responden untuk kehilangan dan ganti rugi yang dialami responden-responden, menyoal sama ada waran geledah adalah sah atau mempertikaikan caranya diperolehi (lihat perenggan 17 & 19–20).

(3) Perayu ketiga, sebagai penolong penguatkuasaan perayu kedua, adalah juga penolong pengawal bawah Akta Hakcipta bawah *Warta* Kerajaan PU(B) 131/2003. Oleh itu, dia berhak mendapatkan perlindungan bawah s 57 Akta Hakcipta kecuali jika terbukti tindakannya berniat jahat. Tiada keterangan menunjukkan serbuan tidak dilakukan dengan niat baik. Waran geledah dan serbuan dikeluarkan dengan sah. Keputusan Mahkamah Tinggi memberikan award kepada responden-responden terhadap perayu-perayu termasuk perayu ketiga adalah satu salah tanggapan (lihat perenggan 22).

(4) Untuk mendakwa atau tidak adalah prerogatif pendakwa raya, berdasarkan ketersediaan keterangan berkaitan dengan kesalahan. Ketiadaan pendakwaan tidak menjejaskan waran geledah dan penyitaan kerana untuk mendakwa atau tidak bergantung pada ketersediaan keterangan bagi membuktikan inti pati kesalahan (lihat perenggan 23–24).]

Notes

For cases on search warrant in general, see 5(1) and 5(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4019–4037.

Cases referred to

Datuk Seri Khalid bin Abu Bakar & Ors v N Indra a/p P Nallathamby (the administrator of the estate and dependent of Kugan a/l Ananthan, deceased) and another appeal [2015] 1 MLJ 353; [2014] 9 CLJ 15, CA (refd)

Ketua Polis Daerah Johor Bahru, Johor & Ors v Ngui Tek Choi [2013] 4 MLJ 504; [2013] 4 CLJ 47, CA (refd)

Waz Lian Enterprise Sdn Bhd v Kerajaan Malaysia & Anor [1994] MLJU 93; [1994] 4 CLJ 979, HC (refd)

Legislation referred to

Copyright Act 1987 ss 41, 44, 44(1), 57
Courts of Judicature Act 1964
Evidence Act 1950 s 114(g)

Appeal from: Suit No 21NCVC-41–07 of 2014 (High Court, Kuala Lumpur)

Rozielawaty bt Ab Ghani (Noor Akmal bt Mustafa Kamal and Natassa bt Zaini with her) (Senior Federal Counsel, Attorney General's Chambers) for the appellants.

Tan Hwee Keong (HK Tan & Co) for the respondents.

Zaleha Yusof JCA:

[1] The first appellant in this appeal is the Government of Malaysia while the second appellant is a Ministry of the first appellant charged with, inter alia, the responsibility for intellectual property. Hence the Copyright Act 1987 ('the Copyright Act') and its enforcement is within the purview of the second appellant. The third appellant is an enforcement assistant of the second appellant.

[2] The respondents are partners of an internet cafe called 'Gen X', which operates at No 28, Tingkat Bawah, Jalan Kaskas 3, Taman Cheras, Kuala Lumpur.

[3] One Blizzard Entertainment, Inc a Delaware (USA) corporation ('Blizzard') is the owner of the copyright works entitled Warcraft 3 Battlechest, Diablo 2 Battlechest and Starcraft Battlechest ('Warcraft copyright').

[4] Blizzard had licensed one Sendi Mutiara Multimedia Sdn Bhd, a Malaysian corporation ('SMM'), inter alia, the right to retail, sell, distribute and collect monthly royalty from cyber cafes for the software products of the Warcraft copyright. SMM was also appointed by Blizzard as its attorney to, inter alia, take legal action against illegal or unauthorised reproduction of the said products.

[5] On 17 November 2009, upon receiving a complaint from SMM of infringement of its Warcraft copyright, a team of enforcement officers of the second appellant which included the third appellant and also representatives of SMM, had gone and raided Gen X. Some items were seized, purportedly for investigation into possible offence under the Copyright Act. However, after a total period of one year and eight months, the seized items were returned to the respondents without them or Gen X being charged for any offence under the Copyright Act.

[6] Consequently the respondents filed an action in the High Court for loss and damages purportedly suffered by them as a result of the appellants' illegal raid and seizure. After a full trial, the High Court had granted some of the reliefs prayed for by the respondents ie special as well as exemplary damages, loss of earning and loss of reputation. Hence this appeal before us by the appellants, being unhappy with the said decision of the High Court.

[7] The main issue before us was whether the search warrant was legally issued. The learned High Court judge was of the view that the search warrant

ought not to be issued in the first place. He gave his reasons as follows:

> ... SD8 presented a complaint based upon a Statutory Declaration prepared by SD5 which had relied upon a surveillance report that was prepared by a person who cannot be traced. The original of the PA was not tendered for perusal of this Court and the licence granted according to the PA by Blizzard Entertainment was only for a limited time ending on 31.12.2009.
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> In addition, this Court is deprived of hearing the reasons of the Registrar for the exercise of her discretion in granting the Warrant. In revisiting the issue of the granting of the Warrant, this Court can safely say that based upon the materials before it, it would rule that it was an unsafe exercise of discretion to grant the Search Warrant.

[8] His Lordship concluded by saying that the raid carried out in consequence of a warrant which ought not to have been granted 'is accordingly illegal'.

[9] The learned High Court judge was also of the view that the very fact that the deputy public prosecutor ('DPP') declined to prosecute (NFA) was indicative that the whole conduct and exercise of their powers of applying for the search warrant, of search, seizures, investigation and detention of the seized items by the appellants was carried out in an outrageous, lackadaisical and negligent manner lacking in the element of bona fide.

[10] Before us, the learned senior federal counsel submitted that the search warrant was properly issued in accordance with s 44 of the Copyright Act. There was no application made to set it aside and there was also no revision to challenge its legality. It was therefore a valid search warrant issued by the court.

[11] Learned senior federal counsel also brought this court's attention to s 57 of the Copyright Act which gave protection to the raiding officer, in this case, the third appellant, who was also the assistant controller under the Copyright Act.

[12] Further she submitted that the fact there was eventually no prosecution framed against the respondents or Gen X did not mean that the search warrant was illegal or there was bad faith on the part of the appellants. It was the prerogative of the public prosecutor based on the available evidence, whether to prosecute or not. In this case, evidence shows the decision not to charge was because there was insufficient materials to prove a charge against them.

[13] Learned counsel for the respondents in his oral submission before us conceded that the search warrant was good in law at the time it was issued and could not be questioned. However he submitted that the learned High Court

judge was right as the SMM computer technician, one Leon Aun Thye who prepared the surveillance technician report upon which the complaint was based, did not come to court to give evidence. Therefore s 114(g) of the Evidence Act 1950 should be invoked. Following that he argued that the learned High Court judge was right in questioning the validity of the search warrant.

OUR DECISION

[14] After perusing the appeal records and judgment of the learned High Court judge and also having heard submissions made by learned counsels for both parties, we decided to allow the appeal with cost. We now give our reasons.

[15] Section 44(1) of the Copyright Act provides, inter alia:

> 44(1) In every case where information is given on oath to any magistrate that *there is reasonable cause for suspecting that there is in any* house or *premises any infringing copy or any contrivance used or intended to be used for making infringing copies* or capable of being used for the purpose of making infringing copies, or any other article or vehicle, book or document *by means of or in relation to which any offence under section 41 has been committed, he shall issue a warrant under his hand by virtue of which any Assistant Controller* or police officer not below the rank of Inspector named or referred to in the warrant may enter the house or premises at any reasonable time by day or night and search for and seize any such copy, contrivance, article, vehicle, book or document ... (Emphasis added.)

[16] The section requires a magistrate to issue a search warrant if information on oath is given that there is reasonable cause for suspecting that any infringing copy etc is in any premises. So, two requirements need to be satisfied:

(a) information on oath; and

(b) reasonable cause for suspecting.

What is 'reasonable cause' has been explained in *Waz Lian Enterprise Sdn Bhd v Kerajaan Malaysia & Anor* [1994] MLJU 93; [1994] 4 CLJ 979 as follows:

> What is reasonable or probable cause? In a case *Herniman v Smith* [1938] 1 All ER 1 involving malicious prosecution, which I think may be applied to our present case, the House of Lords held that the question of the absence of reasonable and probable cause is for the judge and such question is a question of fact and not law. In that case the House of Lords adopted the statement of Hawkins J in *Hicks v Faulkner* [1881] 8 QBD 167 at p 171:
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> > I should define reasonable and probable cause to be, an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true,

A would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.

It had been shown by the appellants that they acted upon receiving the official B complaint from SMM vide a letter dated 26 October 2009, exhibiting its enforcement technical surveillance report, statutory declaration, letter of authorisation and power of attorney. The appellants had scrutinised the complaint before taking action. The search warrant and the raid were not done out of the blue. There was reasonable cause for the appellants to act based on C the official complaint. We were of the view that it was on the respondents to show if there was none and in this instance we were satisfied that the respondents had failed to do so.

D **[17]** In this instant appeal, the information on oath (*maklumat bersumpah*) was given to the magistrate on 17 November 2009, the same day the raid was conducted. As can be seen at p 154 of common core bundle, the 'Maklumat Bersumpah' contains among others:

bahawa dipercayai premis yang beralamat:-

E No. 28, Tingkat Bawah,

Jalan Kaskas 3,

Taman Cheras,

56100 KUALA LUMPUR

F adalah disyaki digunakan bagi maksud membuat, menyimpan atau menjual perekaan yang digunakan atau dicadang untuk digunakan bagi membuat salinan langgaran.

Dari maklumat yang diterima, saya *ada sebab-sebab yang munasabah* untuk mempercayai bahawa satu kesalahan di bawah Seksyen 41, Akta Hakcipta 1987 telah dilakukan oleh penghuni premis tersebut.

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Saya juga ada sebab mempercayai bahawa ada salinan-salinan langgaran, perekaan, artikel, buku, dokumen atau lain-lain keterangan mengenai kesalahan tersebut mungkin ada di premis tersebut. (Emphasis added.)

H **[18]** The 'Maklumat Bersumpah' was given by the third respondent, who by virtue of Government *Gazette* PU(B) 131/2003 ('PU(B) 131') was also an Assistant Controller of Copyright.

I **[19]** The 'Maklumat Bersumpah' had clearly stated that there was a reasonable cause for suspecting that there were in Gen X 'salinan langganan, perekaan, artikel, buku, dokumen atau lain-lain keterangan' pertaining to an offence under s 41 of the Copyright Act. Therefore, it was our view that the magistrate was correct in issuing the search warrant as the requirement of s 44(1) of the Copyright Act as alluded to earlier had already been satisfied.

[20] Let us reiterate that even learned counsel for the respondents in his oral submission before us agreed that the search warrant was good in law at the time of its issuance and there was no question of its invalidity then. To this, we must also say, that not only it was valid then, it is indeed still valid now. The reason being, the search warrant was issued pursuant to the magistrate's criminal jurisdiction. Hence the relevant High Court which has the jurisdiction to set it aside is the High Court exercising its criminal, appellate or revision power under the Courts of Judicature Act 1964. Therefore it is our view, the learned High Court judge in this case, should not, in determining the civil claim of the plaintiffs (respondents) for loss and damages suffered by the respondents, go behind the search warrant and questioned its legality or the manner in which it was obtained. See the Court of Appeal decisions in *Ketua Polis Daerah Johor Bahru, Johor & Ors v Ngui Tek Choi* [2013] 4 MLJ 504; [2013] 4 CLJ 47 and also *Datuk Seri Khalid bin Abu Bakar & Ors v N Indra a/p P Nallathamby (the administrator of the estate and dependent of Kugan a/l Ananthan, deceased) and another appeal* [2015] 1 MLJ 353; [2014] 9 CLJ 15. We fully agreed with learned senior federal counsel that the learned High Court judge erred when His Lordship decided for the respondents based on the purported illegality of the search warrant.

[21] The learned senior federal counsel also argued that the learned High Court judge had erred when His Lordship found the third appellant to be jointly and severally liable to the respondents. This was clearly against s 57 of the Copyright Act which provides as follows:

> *No action* or prosecution *shall be brought, instituted or maintained in any court against any Assistant Controller* or police officer not below the rank of Inspector for or on account of or *in respect of any act ordered or done for the purpose of carrying into effect this Act, and no suit* or prosecution shall lie in any court against any other person for or on account of or in respect of any act done or purporting to have been done by him under order, direction or instruction of any Assistant Controller or police officer not below the rank of Inspector given for any such purpose as aforesaid:
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> > Provided that the act was done in good faith and in a reasonable belief that it was necessary for the purpose intended to be served thereby.

[22] We again endorsed the learned senior federal counsel's submission on this point as well, as the third appellant, being an enforcement assistant of the second appellant, was also by virtue of PU(B) 131 as mentioned earlier, an assistant controller under the Copyright Act. Hence, he was entitled for protection under the aforementioned provision unless it could be shown mala fide on his action. We were not able to find any evidence that shows the raid was done not in good faith. As we had earlier found the search warrant and the raid were validly issued and done the decision of the learned High Court judge to

award the respondents against the appellants which included the third appellant, was obviously misconceived.

[23] As stated earlier the learned High Court judge in para 32 of his ground of judgment had found there was no bona fide in the whole conduct of the appellants as reflected in the non-prosecution of the respondents. However, with due respect we agreed with learned senior federal counsel that to prosecute or not to prosecute is the prerogative of the public prosecutor, based on the availability of evidence pertaining to the offence. SD2 at pp 288–290 of *rekod rayuan tambahan Jld* 2(2) *Bahagian* B, had given the following explanation as to why the respondents were not prosecuted.

S.7 Sila tuan jelaskan, berdasarkan hasil siasatan tuan kenapa kes ini tidak dituduh di Mahkamah?

J.7 Oleh kerana laporan pihak Cyber Security menyatakan tiada software game ditemui dalam server A44 dan simulasi game tersebut juga tidak boleh dijalankan maka TPR telah memutuskan pendakwaan kes tidak diteruskan kerana pertuduhan hakcipta memerlukan pihak pendakwaan membuktikan kewujudan game tersebut namun dalam server yang disita program game tersebut tidak disimpan (save) di dalam hard disk kerana dipercayai Plaintif Pertama menggunapakai server di tempat lain dan game tersebut dibekalkan secara online sahaja. Oleh kerana bekalan elektrik telah dimatikan ketika serbuan dijalankan, maka talian internet telah terputus.

S.8 Adakah dengan tidak menuduh kes ini ke Mahkamah menunjukkan bahawa serbuan dan sitaan yang dibuat itu tidak sah?

J.8 Tidak. Walaupun kes tidak dituduh di Mahkamah namun serbuan dan tindakan yang dilakukan adalah betul dan tidak melanggar mana-mana prosedur atau undang-undang pada bila-bila masa kerana:

(i) Pengadu telah membuat aduan bertulis berhubung pelanggaran hakcipta terhadap karya sastera miliknya.
Rujuk: lampiran 47, m/s 189–191 dan 192–221.

(ii) Pengadu telah membekalkan dokumen yang menunjukkan bahawa Pengadu adalah wakil pemegang hakcipta yang berhak untuk mengambil tindakan pelanggaran hakcipta game tersebut di Malaysia.
Rujuk: lampiran 47, m/s 189–191 dan 192–221.

(iii) Serbuan dan penyitaan dilakukan selepas memperolehi waran geledah yang sah.
Rujuk: lampiran 47, m/s 222 dan 223.

(iv) Penyimpanan eksibit telah dibenarkan melalui permohonan ke Mahkamah selaras dengan peruntukan seksyen 44(2) Akta

Hakcipta.
Rujuk: lampiran 47, m/s 262–273.

(v) Menyimpan atau memiliki salinan langgaran adalah satu kesalahan jenayah kerana Hakcipta bagi karya sastera program adalah dimiliki oleh Pengadu.

[24] Based on the above evidence of SD2, we were therefore of the view that the absence of prosecution in this case did not affect the warrant of search and seizure as whether to charge or not to charge was all depended on the availability of evidence to prove the ingredients of the offence.

CONCLUSION

[25] Based on those reasons, we allowed the appeal by a unanimous decision with cost of RM10,000 to be paid by the respondents to the appellants. The order of the High Court judge was therefore set aside.

Appeal allowed with costs.

Reported by Afiq Mohamad Noor